REMARKS

Claims 1-23 are pending in the present application. In the present Amendment, claims 3 and 15-23 have been cancelled without prejudice or disclaimer. Claims 1, 2, 4, 5, 6, 7 and12 have been amended. New claims 24 and 25 have been added. Reconsideration is respectfully requested in view of the following remarks.

The objection to the claims concerning the use of the abbreviation "DP" is respectfully traversed. As the Examiner has noted, the abbreviation "DP" is accepted in the art as an abbreviation for "degree of polymerization". Therefore, the use of this abbreviation does not render the claims indefinite under 35 U.S.C. 112. However, since the Examiner's requested amendment is not based on any statutory requirement and should not affect the scope of the claims, applicants have amended the claims as requested.

The rejection of claims 1 - 14 under 35 U.S.C. 102 (b) as being anticipated by Caboche (U. S. Patent No. 5,436,329) and by Mentink et al. (U. S. Patent No. 5,314,701) is respectfully traversed for the reasons set forth below.

The Caboche patent teaches a specific formulation of hypocariogenic hydrogenated saccharides that contains from 0.1 to 80% of hydrogenated monosaccharides, from 0.1 to 96% by weight of hydrogenated disaccharides, and from 1 to 40% by weight of polysaccharides which are not hydrolysed by amyloglucosidase in an F test (defined in the patent), with the balance to 100% consisting of hydrogenated oligo- and polysaccharides and with the limitation that the total amount of hydrogenated mono- and disaccharides is from 11 to 96% (see paragraph bridging columns 2 and

3 of the Caboche patent). There is no specific teaching of which polysaccharides are "not hydrolysed by amyloglucosidase" in the F test described in the patent. Accordingly, there is no way that the broad definition of the composition of Caboche contained in the paragraph bridging columns 2 and 3 of the Caboche patent can be said to "anticipate" the invention of the present claims without guesses or assumptions as to the identity of the polysaccharides that are not hydrolysed by amyloglucosidase in the F test. Such guesses or assumptions are an improper method of establishing a prima facie case of anticipation. It is well established law that in order to establish a prima facie case of anticipation, the cited reference must teach each and every element of the claimed invention. It is impossible from the broad teachings of the Caboche patent to determine the content of the hydrogenated trisaccharides, the content of the hydrogenated oligosaccharides of DP from 4 to 10 or the content of hydrogenated polysaccharides of DP greater than or equal to 11. Accordingly, the broad teachings of the Caboche patent are not sufficient to establish a prima facie case of anticipation.

The specific teachings of the Caboche patent that are contained in the working examples do not contain a single formulation that falls within the scope of the present claims. Accordingly, the specific teachings of the Caboche patent cannot be the basis for a prima facie case of anticipation. Further, the fact that none of the formulations described in the working examples fall within the scope of the present claims is strong evidence that the broad definition of the composition that is contained in the paragraph bridging columns 2 and 3 of the Caboche patent does not define a composition that falls within the scope of the present claims. Still further, the fact that none of the formulations described in the working examples fall within the scope of the present claims supports applicant's position that there is no reason to expect that the broad definition of the composition that is contained

in the paragraph bridging columns 2 and 3 of the Caboche patent could define a composition that falls within the scope of the present claims.

In view of the above, it is respectfully submitted that the present claims are not anticipated by the Caboche patent.

The Mentink et al. patent teaches a sugar free hard candy with a multilayer structure. The candy can contain an HSH syrup. The broadest definition of the HSH syrup that applicants could find in the Mentink et al. patent was at column 6, lines 35 - 40, which defined the HSH syrup as having the following composition: a sorbitol (DP=1) content of 0.1 to 19% and a maltitol (DP=2) content of 35 to 90% with the complement to 100% consisting of polyols with a DP greater than 2. This definition is too vague to anticipate the present claims, which recite specific amounts of the hydrogenated saccharides in defined DP ranges. Further, this definition does not even encompass the presently claimed HSH because it calls for 35 to 90% maltitol (DP=2) and the present claims recite a content of hydrogenated dissaccharides of less than 34.3 wt.-%. Although the Mentink et al. patent has further preferred definitions of the HSH syrup which specify the amounts of hydrogenated saccharides in the various DP ranges (see for example column 6, lines 40 - 60), none of these definitions is specific enough to "anticipate" the HSH of the present claims (i.e., teach each and every element of the claims). Furthermore, these preferred definitions of the HSH syrup also define syrups that are not encompassed by the present claims. Finally, none of the specific formulations that are described in the examples of the Mentink et al. patent fall within the scope of the present claims.

In view of the above, it is respectfully submitted that the Mentink et al. patent does not teach each and every element of the present claims. Accordingly, the Mentink et al. patent cannot be the basis for a prima facie case of anticipation.

In addition, there is no teaching in either of the cited references of powder particles comprising malic acid or a mixture of acidulants encapsulated within a coating comprising the hydrogenated starch hydrolysate of present claim 1 or a coating of hydrogenated maltodextrin (present claims 13 and 14). The Examiner's only comment with regard to claim 13 was that the inclusion of an acidulant was not seen to be novel over the prior art as the use of acidulants in this food art is common practice. Initially, it is respectfully submitted that an anticipation rejection must be based on prior art that teaches each and every element of the rejected claim. If one or more elements of the rejected claim is missing from a prior art reference, then a prima facie case of anticipation cannot be established using that reference. An Examiner's opinion as to whether or not the element of a claim that is missing from the references is "novel" is irrelevant and cannot be used as the basis for an anticipation rejection. Further, in the matter at hand, claims 13 and 14 do not generally claim the use of an acidulant in combination with the hydrogenated starch hydrolysate of claim 1 or with hydrogenated maltodextrin. Instead, in both of these claims the composition of matter being claimed is powder particles of malic acid or a mixture of acidulants encapsulated within a coating of the hydrogenated starch hydrolysate or hydrogenated maltodextrin. There is simply no teaching whatsoever in the cited references of powder particles having a structure wherein acidulants are encapsulated within a coating of hydrogenated starch hydrolysate or hydrogenated maltodextrin. Accordingly, these claims are clearly not anticipated by the cited references.

In view of the foregoing, it is respectfully requested that the anticipation rejection over the Caboche and Mentink et al. patents be withdrawn.

It is noted that the Examiner did not initial the Form PTO-1449 next to the entry for EP 0775 709 or the abstract thereof. However, applicant's records show that a copy of at least the abstract for EP 0 775 709 was submitted with the Information Disclosure Statement dated May 3, 2000 and should have been considered. Applicants have attached to this Amendment a duplicate copy of the English language abstract of EP 0 775 709 that was submitted with the aforementioned Information Disclosure Statement. It is respectfully requested that the Examiner consider this abstract and make an entry into the record of this patent application that this abstract was considered.

Reconsideration of the present application and a favorable action concerning claims 1, 2, 4-14, 24 and 25 is respectfully requested.

Respectfully submitted,
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Attachment: Appendix A; Abstract of EP 0 775 709
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